Statute of Limitations for Suits Against Attorneys: Contract or Tort?

When a former client brings a malpractice suit against an attorney, is the suit normally a tort action or a contract action? Does it make a difference to the plaintiff-former client or to the defendant-attorney? This comment will discuss one aspect of that question: the attorney's defense of the statute of limitations on a plaintiff's malpractice claim.

According to some state court decisions,[1] an action for malpractice may sound in either tort or contract. In these states, the plaintiff may then choose under which theory he wishes to bring his case. What defense is the statute of limitations to the attorney in those states? In Louisiana, the plaintiff appears to have the upper hand. In *Ambrose v. Roberts*,[2] the former client filed a suit against her attorney alleging that he had failed to file in a timely manner for damages which arose when she had been wrongfully committed to a mental institution. The Louisiana Court of Appeals for the Third Circuit held that a malpractice action against an attorney could state a claim both in tort and in contract "even though the petition be couched in language asserting a claim based on the negligence of the attorney."[3] The court's decision was important to the plaintiff because the statute of limitations for the tort claim had already run, while the limitation on the contract claim had not. Thus, the plaintiff could maintain her suit on a contract theory against her former attorney.

One year later the *Ambrose* case was cited in the case of *Bill Nolan Livestock, Inc. v. Simpson*,[4] decided by the Louisiana Court of Appeals for the First Circuit. The *Bill Nolan* case had a twist to it—the attorney now being sued for malpractice had been appointed by the court as the attorney for the company in a suit against the Bill Nolan Livestock Company. The attorney had no contact with the company prior to the first suit.[5] The Court of Appeals held that since there was no meeting of the minds between the attorney and the company, there could be

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1. *See, e.g.*, Ambrose v. Roberts, 393 So. 2d 132 (La. Ct. App. 1980); Hutchinson v. Smith, 417 So. 2d 926 (Miss. 1982); Vollgraff v. Block, 117 Misc. 2d 489, 458 N.Y.S.2d 437 (Sup. Ct. 1982); Harrison v. Castro, 271 S.E.2d 774 (W. Va. 1980).
2. 393 So. 2d 132, 133 (La. Ct. App. 1980).
3. *Id.* at 134 (quoting Johnson v. Daye, 363 So. 2d 940 (La. Ct. App. 1978)).
4. 402 So. 2d 214 (La. Ct. App. 1981).
5. *Id.* at 216-17.

no contractual relationship, and therefore the suit for malpractice could lie only in tort.[6]

The Supreme Courts of New York and Mississippi have also expressed the view that an action for malpractice may be in contract or tort, however, in contrast to the *Ambrose* decision, the plaintiff does not have a choice of time limits. In *Vollgraff v. Block*,[7] the plaintiffs were injured in a car accident and hired the defendant-attorney firm to represent them in their personal injury action. They alleged that the firm had not filed suit on their behalf in a timely manner and because of that failure to file, their personal injury claim was dismissed.[8] The court held that "[g]enerally in the case of professional malpractice, although the relationship of the parties originated in contract, the rule is that a defendant's common law duty and contractual duty are one and the same and therefore for time limitation purposes, the action is one of negligence, and the shorter time limitation (the tort statute of limitation is three years and the contract limitation is six years) applies."[9] In the case of *Hutchinson v. Smith*,[10] the Mississippi Supreme Court held similar to the New York court in *Vollgraff* by stating that the "elements of an action for legal malpractice consist of the existence of the relationship of attorney and client, the acts constituting the alleged negligence, that the negligence was the proximate cause of the injury and the fact and extent of the injury alleged,"[11] thereby requiring the tort limitation to apply.

A second variety of state court decisions[12] hold that a legal malpractice action sounds only in tort and therefore only the tort statute of limitations applies. In *Heyer v. Flaig*,[13] the California court stated that the action lies in a tort claim. In that case, the defendant-attorney allegedly failed to fulfill the testamentary wishes of his client, and the daughters of the deceased client filed suit for negligent malpractice against the attorney.[14] Although the issue in the case concerned the time the statute of limitations begins to run against the intended

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6. *Id.* at 217.
7. 117 Misc. 2d 489, 458 N.Y.S.2d 437 (Sup. Ct. 1982).
8. *Id.* at _____, 458 N.Y.S.2d at 438.
9. *Id.* at _____, 458 N.Y.S.2d at 439.
10. 417 So. 2d 926 (Miss. 1982).
11. *Id.* at 927-28.
12. *See, e.g.*, Quezada v. Hart, 67 Cal. App. 3d 754, 136 Cal. Rptr. 815 (1977); Christison v. Jones, 83 Ill. App. 3d 334, 405 N.E.2d 8 (1980).
13. 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).
14. *Id.* at _____, 449 P.2d at 163, 74 Cal. Rptr. at 227.

beneficiaries of a will,[15] the court discussed why the malpractice action was a tort action. The court stated that "[a]n attorney who negligently fails to fulfill a client's testamentary directions incurs liability in tort for violating a duty of care owed directly to the intended beneficiaries"[16] and that "the crux of the action must lie in tort . . .; there can be no recovery without negligence."[17] Although the court did not decide specifically that the tort statute of limitations applied, it can be reasonably inferred from the court's decision that a malpractice action in California lies only in tort and therefore the statute of limitations for tort actions is applicable.

A third variety of state court decisions contain a combination of statutory interpretation and judicial law making. These states include Georgia[18] and Indiana.[19] In Georgia, the applicable statute has been interpreted to mean that "legal malpractice is based upon the breach of a duty imposed by the attorney-client contract of employment, and as such, the applicable statute of limitations is four years."[20] In *Frates v. Sutherland, Asbill, and Brennan*,[21] the former client filed suit against the defendant-attorney firm alleging a failure on the part of the attorneys to perform the legal services with the requisite skill and care of attorneys of ordinary skill.[22] The court stated that "[t]he applicable statute of limitations for an alleged breach of duty imposed by the attorney-client contract of employment is four years."[23] Thus, the statute of limitations applied is a statutory limit for a contract action using words and phrases akin to a tort action.

In Indiana, the case of *Whitehouse v. Quinn*[24] distinguishes an earlier case requiring that the malpractice claim be brought in a tort action.[25] The plaintiff in *Whitehouse* sustained personal injuries in an

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15. *Id.* at _____, 449 P.2d at 162, 74 Cal. Rptr. at 226.
16. *Id.* at _____, 449 P.2d at 163, 74 Cal. Rptr. at 227.
17. *Id.* at _____, 449 P.2d at 164, 74 Cal. Rptr. at 228.
18. *See, e.g.*, Riddle v. Driebe, 153 Ga. App. 276, 265 S.E.2d 92 (1980); Frates v. Sutherland, Asbill, & Brennan, 164 Ga. App. 243, 296 S.E.2d 788 (1982).
19. *See, e.g*, Whitehouse v. Quinn, _____ Ind. App. _____, 443 N.E.2d 332 (1982); Shideler v. Dwyer, _____ Ind. _____, 417 N.E. 2d 281 (1981).
20. Riddle v. Driebe, 153 Ga. App. 276, _____ , 265 S.E.2d 92, 94 (1980) (citing GA. CODE ANN. § 3-706 (Supp. 1981)).
21. 164 Ga. App. 243, 296 S.E.2d 788 (1982).
22. *Id.* at _____, 296 S.E.2d at 789.
23. *Id.* at _____ (quoting McClain v. Johnson, 160 Ga. App. 548, 288 S.E.2d 9 (1981)).
24. _____ Ind. App. _____, 443 N.E.2d 332 (Ind. App. 1982).
25. Shideler v. Dwyer, _____ Ind. _____, 417 N.E.2d 281 (1981). The court

automobile accident and hired the defendant-attorney to represent him in all the claims arising from the accident until a final settlement was reached.[26] The accident involved several possible and probable defendants. The malpractice claim arose when, on the advice of the attorney, the plaintiff signed a release for all claims arising from the accident although he had not received any money from several of the possible defendants.[27] The court held that "[t]he written contract on its face contains a promise the nonperformance of which is the basis and essence of the claim . . ."[28] and that a "claim predicated upon the nonperformance of an express promise contained in a written attorney-client contract is actionable in Indiana and is governed by the statute of limitations applicable to written contracts."[29] Thus, in Indiana for a legal malpractice claim in which there is an express promise of performance, the statute of limitations is twenty years[30] and where there is no express promise of performance, the statute of limitations is two years.[31] Indiana differs from Louisiana in that it is the court that makes the decision in which action—tort or contract—the plaintiff may sue as opposed to the plaintiff's ability to sue in both tort and contract.[32]

Conclusion

Where does the attorney stand when using the defense of the statute of limitations? In many states, the case law is confused as to which form of action legal malpractice falls within. Dean Wade[33] may have stated this best when he said:

> The attorney's liability for negligence arises out of the attorney-client relationship. This relationship is created through a contract. Is the action for damages one for breach of contract or one for tort? . . . If the action is treated as one in tort, the court is con-

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held that since the plaintiff in the case was not the defendant-attorney's client and therefore not a party to the contract, then the "claim for injuries to rights or interests 'in or to' personal property" was not expressly covered by a promise in contract and so the action was said to be under the two year statute of limitations. *Id.* at _____, 417 N.E.2d 288.

26. *Whitehouse* _____Ind. App. _____, 443 N.E.2d at 334.
27. *Id.* at _____, 443 N.E.2d at 333.
28. *Id.* at _____, 443 N.E.2d at 337.
29. *Id.*
30. IND. CODE. ANN. § 34-1-2-2(6) (West's Code Ed. 1983).
31. IND. CODE ANN. § 34-1-2-2 (West's Code Ed. 1983).
32. See notes 2 through 6.
33. Wade, *Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959).

> cerned to find present the various elements of a cause of action in negligence, and the fact the duty to use care arises out of a contract normally has no immediate significance. If the action is treated as one in contract, the court simply declares that the attorney 'impliedly contracts' to exercise the degree of care, skill, and knowledge which would be required by the negligence standard.[34]

From the many cases discussing the applicable statute of limitations in a legal malpractice suit,[35] it can readily be seen that this defense is a valuable tool to an attorney accused of malpractice. Some courts are sympathetic to the plaintiff-former client such as those in Louisiana, California, and Indiana, while others are more strict with the interpretations of statutory rules concerning a legal malpractice suit, such as those in New York, Georgia, and Texas. Usually the contract statute of limitations protects the former client, while the shorter tort period aids the attorney. Unless there is a specific statute involved, there is case authority for an injured client to utilize the longer period in a situation where the attorney's conduct has been particularly wrongful or negligent.

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34. *Id.* at 756.

35. *See, e.g.*, Oleyar v. Kerr, 217 Va. 88, 225 S.E.2d 398 (1976); Kohler v. Woollen, Brown & Hawkins, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973); Hillhouse v. McDowell, 219 Tenn. 362, 410 S.W.2d 162 (1966).